NO. 83854-2

SUPREME COURT OF THE STATE OF WASHINGTON

CROWN CORK & SEAL,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER BY DEPARTMENT OF LABOR & INDUSTRIES TO CROWN CORK & SEAL'S PETITION FOR REVIEW

ROBERT M. MCKENNA
Attorney General

NATALEE RUTH FILLINGER
Assistant Attorney General
WSBA # 31436
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7713

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY OF RESPONDENT

Respondent Department of Labor and Industries (Department) opposes the petition of Crown Cork and Seal (Crown) for discretionary review of the unpublished, unanimous decision ("the Opinion") (copy attached) of Division Two of the Court of Appeals in *Crown Cork & Seal v. Department of Labor & Industries*, No. 36921-4-II, 2009 WL 2233108 (decision filed July 28, 2009; reconsideration denied October 7, 2009).

II. DECISION OF THE COURT OF APPEALS

The Opinion below reverses a decision granting Crown access to the second-injury relief fund pursuant to RCW 51.16.120. RCW 51.16.120 relieves an employer from the bulk of responsibility for a workers' compensation pension, through the second-injury fund, where the employer can meet a two-pronged test. The employer must prove that (1) a worker suffered from "previous bodily disability" and (2) then incurred an industrial injury producing a further permanent disability that, combined with the preexisting disability, produced permanent total disability. The Opinion below agrees with self-insured employer Crown that a worker's previous permanent medical condition qualifies as such previous bodily disability if the condition "substantially and negatively impacts a worker's daily functioning and efficiency." [1] The Opinion

[1] Slip op. at 8. If this Court grants review, the Department will argue that the second-injury fund standard applied by Division Two in this case and by Division One of the Court of Appeals in *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 888, 205 P.3d 979 (2009), have set the "previous bodily disability" standard too low for employers, because the standard under RCW 51.16.120 requires a showing that the worker's previous bodily disability had some affect on the worker's earning power or

disagrees, however, with Crown's argument that such a "previous bodily disability" is demonstrated by mere evidence of some prior pain and some ongoing difficulty performing household chores, as was shown in the evidence before the Board.

Crown's petition incorrectly asserts that the Opinion conflicts with case law that precludes appellate courts from substituting their own findings of fact for those of the superior court. PFR at 8. Rather, the Opinion simply and correctly concludes, *as a matter of law*, that there is no evidence in the record supporting a "previous bodily disability" determination under the legal standard that was urged by Crown and accepted by the Court of Appeals.

The other line of attack in Crown's petition is that the Opinion conflicts with a decision of this Court interpreting RCW 51.16.120. But Crown provides no explanation for this conclusory contention. This is no conflict. Review should be denied.

III. COUNTERSTATEMENT OF THE ISSUE

Crown cites RAP 13.4(b)(1), conflict with decisions of this Court, as the sole basis for discretionary review. Pet. at 6. But Crown fails to establish any conflict. Review therefore should be denied. If the Court were, however, to accept review, the following issue would be presented:

Does a previous medical condition that caused some pain and some difficulty with household chores, but did not prevent the worker from

---

ability to work. *See, Rothschild v. Department of Labor & Industries*, 3 Wn. App. 967, 969, 478 P.2d 759 (1970).

doing all of his or her job tasks and household chores, qualify as a "previous bodily disability" under RCW 51.16.120?

IV. COUNTERSTATEMENT OF THE CASE

A. Prior to Her 1997 Leg Injury, Ms. Smith Was An Exemplary Crown Employee Who Required No Accommodation To Perform Her Job Duties

When Ms. Smith began working for Crown in November 1980, she was a healthy, 34-year-old woman. CABR Smith 33.[2] CABR Berndt 18.

Crown manufactures beer and soda cans. CABR Gorker 6. During her 18 years with the company, Ms. Smith held various jobs. At the time of her 1997 industrial injury, Ms. Smith worked as a "bagger." CABR Gorker 6. As a bagger, Ms. Smith's primary job duty was to bag and stack the lids of soda cans. CABR Smith 34-37; CABR Gorker 6-7.

Ms. Smith testified that the lids would gather, she would push a string of soda can ends into a bag, physically take that bag off the mandrel, fold the top of the bag over tightly, and then stack it onto a pallet. *Id.* She would repeat this pattern about every 20 seconds during her entire 12-hour shift, four days per week. *Id.* Put another way, her job required her to make continuous hand movements three times a minute, 180 times an hour, over 2000 times a day, four days a week. *Id.*

A number of baggers, including Ms. Smith, complained that they suffered from hand pain as a result of performing this same bagging task

---

[2] "CABR" references the Certified Appeal Board Record, which is the record on review in a court appeal. RCW 51.52.115. Witness testimony will be cited as "CABR [witness name] [page number of transcript]." Board documents will be cited as "CABR [Board-stamped page number in the lower right corner of the document]."

thousands of times per day. CABR Gorker 10-11. Ms. Smith's supervisor, Mr. Gorker, acknowledged that Ms. Smith did not complain about hand pain any more than any other bagger that worked at Crown, and that she never requested that any modification be made to either her job duties or to the equipment at the plant. CABR Gorker 16.

Crown redesigned the bagging machine based on numerous complaints from all of the baggers who worked on it. CABR Smith 41. There is no evidence that the job was modified to accommodate Ms. Smith in particular, and, in fact, the trial court specifically found that Ms. Smith's hand pain did *not* cause her to need any modifications *other than* the change that was made based on the complaints of *all* of the baggers. CP 40; CABR Smith at 41.[3] Ms. Smith periodically[4] wore hand splints to mitigate the strain on her hands. CABR Smith, 36; CABR Berndt 19-20, 80. However, Mr. Gorker acknowledged that Ms. Smith was never rendered unable to perform any of her job duties as a result of her hand pain:

> Q: As compared to other baggers, did she complain a lot?
> A: No.

---

[3] Q: Do you remember ever going to your supervisor asking for the [bagger] job to be modified?

A [Smith]: . . . Directly I don't recall that, but we all talked about it in meetings and stuff like that and then one day they just changed [the bagging machine].

CABR Smith 41.

[4] The trial court found that Ms. Smith wore splints "during" 1994 though 1997 (CP 40), but the trial court did not find that she always wore them during this period, nor would such a finding be supported by the evidence.

> Q: Was she ever unable to perform her job functions as a result of her carpal tunnel symptoms?
> A: No.

CABR Gorker 16.

There is no evidence that Ms. Smith's hand pain or her use of hand splints interfered in any way with the performance of her job duties. The undisputed evidence shows that Ms. Smith was an exemplary employee throughout her tenure at Crown. CABR Gorker 14. She was never reprimanded. CABR Smith 42. She was an enthusiastic and hard worker. CABR Smith 43. She rarely called in sick, and she got along with her co-workers. CABR Gorker 14, 16; CABR Smith 42-43.

Mr. Gorker acknowledged that during Ms. Smith's 18 years at Crown, she never asked for any individual workplace accommodations, nor did it appear she needed any. CABR Gorker 14; CABR Smith 43; CABR Berndt 31-32. The undisputed evidence was that Ms. Smith was an excellent employee and that she had *no* performance issues. CABR Gorker 14, 16, 17; CABR Berndt 32. Notably, Mr. Gorker specifically testified that he did not regard Ms. Smith as "disabled" at the time of her industrial injury of January 10, 1997.[5]

Similar to her lack of vocational disability, Ms. Smith's hand pain did not impact her personal life to any significant degree. CABR Berndt

---

[5] Q: Prior to Ms. Smith's 1997 injury, did you consider her disabled as a result of her carpal tunnel?
A [Gorker]: No, I did not.

CABR Gorker 17.

35-37, 55, 72-73. For example, Barbara Berndt, a Board Certified Vocational Expert, testified as follows:

> So when I'm looking for something preexisting, I want to see something that thwarts that person's ability to do jobs or have to accommodate or modify or they're truncated in some sort of aspect of their life because they can't do things.
>
> It appears that she was able to function at work and do her job. It appears that she was able to function at home, pay her bills, get back and forth to work, raise two sons. I couldn't find things that would show that there was an impact on her work or home of any kind of relationships due to physical, psychological, mental, emotional, cognitive, or any kinds of limitations.

CABR Berndt 36-37.

B. There Is No Medical Evidence That Prior To 1997 Ms. Smith Suffered From Any Permanent Disability of Her Wrists Or Hands

On January 10, 1997, a forklift ran over Ms. Smith's leg causing extensive injuries. CABR Smith 32. However, prior to her January 10, 1997 injury, there were two occasions in which Ms. Smith sought treatment for symptoms relating to upper extremity pain. First, in 1982, Ms. Smith suffered an industrial injury to her right thumb and filed a claim. CABR Berndt 19. However, her claim for the right thumb injury was closed without any award for permanent partial disability, and it did not result in any limitations on her work.

Second, Ms. Smith sought medical treatment and filed a claim for wrist pain in early 1994. CABR Smith Ex. 1. Specifically, on January 5,

1994, Ms. Smith went to the emergency room because her wrists were hurting her. CABR Smith 44. The emergency room doctor diagnosed her with "tendonitis" and provided her with wrist splints/braces. CABR McPhee 19.

Ms. Smith then saw Dr. Sean T. Atteridge on January 31, 1994. Dr. Atteridge diagnosed her as having tenosynovitis – not carpal tunnel syndrome. CABR Atteridge 30.

Ms. Smith then made a follow-up visit to Dr. Michael Parker, an associate of Dr. Atteridge, on February 9, 1994. Dr. Parker noted that Ms. Smith's wrist complaints had gotten "*significantly better*," and his examination showed she had no swelling or tenderness, and she had good grip strength. CABR Atteridge 30-31. Ms. Smith had no physical restriction from her tenosynovitis, and she did not receive any permanent disability award on her claim. CABR Berndt 19-20.

Following the February 9, 1994 visit, Ms. Smith did not seek *any* additional medical treatment for wrist and/or hand complaints until *after* her 1997 industrial injury to her leg. CABR Smith 44-45. CABR Atteridge 31. Ms. Smith did not see Dr. Atteridge again until May 26, 1998, which was almost a year and a half after her 1997 industrial injury. CABR Atteridge 30-31.

In fact, when Ms. Smith saw an occupational therapist shortly *after* her 1997 industrial injury, the occupational therapist specifically noted that Ms. Smith had *normal* upper extremity functions at that time. CABR Berndt 21. Ms. Smith had another physical therapy evaluation done on

August 4, 1997. The August 4, 1997 evaluation noted impairments related to her January 1997 leg injury, but did not note any other medical difficulties. CABR Berndt 21-22.

The first time that Ms. Smith sought actual treatment for wrist and forearm pain was four years *after* her 1997 industrial injury, in 2001. CABR Berndt 26; McPhee 29. A physical capacities report in September of 1998 noted that Ms. Smith had "pre-existing" carpal tunnel syndrome, but this was based on her own characterization. CABR McPhee 29. However, the record is unclear as to when it was that a medical doctor actually diagnosed the condition for the first time. It appears from the record that it could have been as late at 2002, because, prior to that, the condition was merely referred to as hand pain. CABR Atteridge 19; CABR McPhee 18, 29-30; CABR Berndt 26-28, 77.

In any event, there is no medical evidence that Ms. Smith had any medical condition that was disabling prior to her 1997 industrial injury. Indeed, Ms. Smith's attending physician, Dr. Atteridge, admitted that he *did not know* whether or not Ms. Smith's carpal tunnel condition was disabling at the time of her January 10, 1997 industrial injury.[6]

---

[6] Q: At the time she suffered the industrial injury, January 10th, 1997, was she, at that time, suffering symptomatic and disabling effects, as far as you know, as a result of her bilateral carpal tunnel condition?

A [Atteridge]: At the time she was injured?

Q: Yes.

A [Atteridge]: I don't know.

(CABR Atteridge 15.)

C. Efforts At Vocational Rehabilitation Gave Rise To Ms. Smith's Wrist And Hand Disability

Following Ms. Smith's 1997 leg injury, Crown assigned Erin McPhee, a vocational counselor, to evaluate Ms. Smith's ability to work, and to determine whether or not Ms. Smith would benefit from vocational retraining. CABR McPhee 5. Ms. McPhee initially opined that Ms. Smith would benefit from vocational retraining. CABR Berndt 38. Ms. McPhee drafted a retraining plan with a job goal of "office helper". CABR Berndt 27. The retraining plan, among other things, required Ms. Smith to perform keyboarding. CABR Berndt 39, 43. Three different medical doctors cleared Ms. Smith to participate in the retraining plan. CABR Berndt 27.

However, almost immediately after Ms. Smith began participating in the retraining plan, she developed severe carpal tunnel-related symptoms. CABR McPhee 11-12. Dr. Atteridge testified that Ms. Smith's carpal tunnel syndrome "evolved" into a disabling condition after her 1997 leg injury as a result of both Ms. Smith's use of crutches and the keyboarding required by her retraining plan. CABR Atteridge 12, 16-17. Ultimately, Dr. Atteridge opined, because Ms. Smith's now-disabling, post-injury carpal tunnel syndrome precluded her from participating in the retraining plan, she was permanently incapable of obtaining and performing any form of reasonably continuous gainful employment. CABR Atteridge 27.

D. Procedural Background

Crown sought second injury fund relief, claiming that Ms. Smith's carpal tunnel related symptoms constituted a "previous bodily disability" which combined with her 1997 industrial injury to produce her permanent total disability. On May 11, 2005, the Department denied second-injury fund relief to Crown. CABR 62. Crown timely appealed the Department's order. CABR 62. After holding hearings, the Board's Industrial Appeals Judge issued a proposed order affirming the Department order denying Crown second-injury fund relief, holding that any pre-existing condition Ms. Smith may have had did not constitute a "previous bodily disability" within the meaning of RCW 51.16.120 (1), and that as a result, Crown was not entitled to second-injury fund relief. CABR 27-37. Crown petitioned the three member Board for review. CABR 3-22. The Board denied review and adopted the proposed decision as its final order. CABR 2.

Crown timely appealed the Board's ruling to superior court. CP 4. Following *de novo* review of the Board record per RCW 51.52.115 in a bench trial, the superior court reversed the ruling of the Board. CP 38-42. The Department timely appealed to the Court of Appeals. CP 43-49. In an unpublished opinion, the Court reversed the trial court and denied the employer second-injury fund relief on July 28, 2009. Crown moved for reconsideration, which the Court denied. Crown petitioned for review.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. The Opinion Rules As A Matter Of Law And Does Not Substitute Its Own Findings Of Fact For Those Of The Trial Court

Crown's petition rests almost entirely on its assertion that the Opinion substitutes its own factual findings for those of the trial court. Crown's PFR at 6. Notably, this assertion fails to establish a basis for granting discretionary review under RAP 13.4(b).

Turning to the substance of the assertion, Crown correctly notes that *Ruse v. Department of Labor & Industries,* 138 Wn.2d 1, 5, 977 P.2d 570 (1999) and *Sunnyside Vally Irrigation District v. Dickie,* 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003) hold, as do legions of cases, that an appellate court cannot substitute its factual determination for that of the trial court. But Crown is incorrect that the Opinion substitutes its own view of the evidence. As noted above in Part II, the Opinion simply and correctly determines that no evidence supports Crown's assertion that the worker suffered from "previous bodily disability" within the meaning of RCW 51.16.120.

Crown appears to suggest both that the trial court's Findings of Fact Nos. 1, 3, 4, and 5 are somehow rejected in the Opinion, and that those findings compel the legal conclusion that there existed "previous bodily disability." Crown fails to articulate which, if any, of those findings it contends were actually rejected in the Opinion. PFR at 5-6. Nor does Crown articulate what findings the Opinion supposedly made in

the place of any of those findings. In any event, a careful comparison of Findings 1, 3, 4, and 5 with the Opinion reveals that there is no conflict.

Crown alleges in broad and general terms that the Appellate Court ignored the trial court's Finding 1, but Crown fails to explain how the Opinion rests on a finding that is different from that trial court finding.[7] A careful review of the Opinion reveals that the Opinion does not contradict the trial court's finding that Ms. Smith's job required constant wrist movements, that she sought treatment for carpal tunnel syndrome prior to her leg injury, and that she wore wrist splints and braces while working and sleeping. Rather, the Opinion concludes *as a matter of law* that those findings do not amount to a "previous bodily disability." Slip op. at 9.

The Opinion agrees with Crown that a pre-existing condition constitutes a "previous bodily disability" if the pre-existing condition "substantially and negatively impact[ed] a worker's daily functioning and efficiency," slip op. at 8, which the Opinion equates to "a loss of daily functioning and efficiency." Slip op. at 8. The Opinion concludes that the mere facts, per Finding 1, that a claimant (1) required treatment for a condition prior to an injury, and (2) sometimes wore wrist splints prior to an injury, are not sufficient to establish that the condition resulted in the

[7] Finding 1 provides: "Claimant Sylvia M. Smith was born on January 19, 1945. In November 1980 she started employment with Plaintiff, Crown, Cork and Seal Company Incorporated. Her work demanded constant repetitive movement of her hands. In January 1994 she experienced pain in her left and right wrists and swelling in both arms. She sought medical treatment at Providence St. Peters emergency room and received wrist splints/braces to wear while working and sleeping. She later on January 31, 1994 conferred with Dr. Sean Atteridge an osteopath who was certified in family practice concerning the pain in her wrist and forearms." CP 2.

loss of daily functioning and efficiency that would qualify as previous bodily disability. *Id.*

Crown's reliance on Finding 3 is similarly misplaced.[8] The trial court found that Ms. Smith's inability to be retrained *following her industrial injury* was related to both her pre-existing carpal tunnel syndrome and her industrial injury. CP 40. The Opinion does not purport to find that Ms. Smith's inability to be retrained to do any sort of work *after* her industrial injury was unrelated to her carpal tunnel syndrome.

Rather, the Opinion concludes that because Ms. Smith's carpal tunnel syndrome did not cause a loss of physical or mental efficiency prior to her injury, the condition was not a "previous bodily disability" within the meaning of RCW 51.16.120. Slip op. at 9. The Opinion does not conflict with Finding 3.

Crown's reliance on Finding 4 is also misplaced.[9] The Opinion does not reject the trial court's finding that Ms. Smith had "difficulty" with chores such as cutting vegetables and mowing her lawn. Rather, the Opinion concludes that the mere presence of pre-existing pain and difficulty is not enough to establish a "previous bodily disability" in the

---

[8] Finding 3 provides: "Erin McPhee, further testified, and the court finds, that the inability to retrain Ms. Smith resulted directly from her pre-existing carpel tunnel syndrome conditions and her industrial injury." CP 40.

[9] Finding 4 provides: "The claimant, Ms. Smith, testified, and the court finds, that prior to her industrial injury her bilateral carpal tunnel conditions caused difficulty with day to day activities such as cutting vegetables, mowing her lawn, and most of her house work." CP 40.

absence of evidence that the condition actually caused a substantial loss of "physical or mental efficiency." Slip op. at 9.

The Opinion correctly concludes that a worker who has "difficulty" performing certain tasks due to a pre-existing condition does not have a "previous bodily disability" if the evidence also shows that the worker was able to perform those tasks without any loss of efficiency. *Id.* There is no conflict between the Opinion and Finding 4.

Crown's reliance on Finding 5 is likewise misplaced.[10] The trial court found that Crown modified the job that Ms. Smith was doing based on complaints by *all of the baggers*, including, *but not limited to*, Ms. Smith. Finding 5 does not establish that Ms. Smith suffered a loss of efficiency in performing her job due to her carpal tunnel syndrome.

Rather, the finding establishes that Crown modified the job to accommodate all of its baggers based on a collective complaint by all of the baggers that the equipment at Crown was causing hand and wrist pain. There is thus no conflict between (1) the Opinion's conclusion that Ms. Smith did not suffer any loss of physical and mental efficiency as a result of her hand pain, and (2) the trial court's finding that Crown modified one of its jobs based on complaints by all of the employees who performed that job.

---

[10] Finding 5 provides: "Smith further testified, and the court finds, that the position she performed with Plaintiff Crown, Cork and Seal had been modified prior to her industrial injury because of wrist and hand complaints made by her and her fellow workers." CP 40.

Moreover, in order to be viewed in its proper context, Finding 5 should be read in conjunction with Finding 12, which provides:

> Prior to the industrial injury Ms. Smith's pre-existing bilateral carpal tunnel syndrome did not cause her to miss work nor did it require further accommodation at work in ways not provided to other employees performing her job except that she wore bi-lateral wrist splints in order to perform her work activities. Ms. Smith was considered a good employee and there was no evidence that would demonstrate otherwise [sic] and she advanced according to the union pay scale.

CP 41. Finding 12 establishes again that Ms. Smith did not require *any* accommodation at work for her carpal tunnel syndrome. The only change that Crown made to the job that Ms. Smith was performing at the time of her injury was the change that Crown made to accommodate the complaints of *all* of the baggers who worked for Crown.

Finally, Crown also appears to argue that the trial court found that Ms. Smith's pre-existing carpal tunnel syndrome negatively impacted her ability to perform her job and interfered with her enjoyment of the first day of her "weekend." PFR at 8. However, this argument is unsupported and unsupportable.

A careful review of the trial court's findings reveals that the trial did *not* find that Ms. Smith's job performance at Crown was impacted by her carpal tunnel syndrome. Indeed, as noted above, the trial court specifically found that Ms. Smith did *not* need any accommodation to perform her job at Crown based on her carpal tunnel syndrome, and that

the only change that was made to her job was a change that was made based on complaints by *all* of the baggers who worked for Crown. Nor did the trial court find that Ms. Smith's enjoyment of the first day of her weekend was hampered by her carpal tunnel syndrome, a finding which, in any event, would not compel a determination of "previous bodily disability."

B. The Opinion's Conclusion That Crown Is Not Entitled To Second-Injury Fund Relief Is Entirely Consistent With This Court's *Jussila* Decision

Crown suggests vaguely and broadly that the Opinion is inconsistent with this Court's decision in *Jussila v. Department of Labor & Industries*, 59 Wn.2d 772, 370 P.2d 582 (1962). PFR. at 8. Crown's suggestion is not supported by any argument and is, in any event, without merit.

Jussila is the only case in which this Court has addressed what an employer must prove in order to show that it is entitled to second-injury fund relief. *Jussila*, however, does not address the meaning of "previous bodily injury," which is the issue here. Instead, *Jussila* addresses the "combined effects" test or "but for" test, which is the other prong of the *two-pronged test* (noted above in Part I) for second-injury fund relief. [11]

The employer in *Jussila* established that the worker had incurred an industrial injury prior to going to work for that employer. *Id.* at 774.

---

[11] The "combined effects" test is also known as the "but for" test because, in order for an employer to meet the test, the employer must prove that "the disability would not have been total *but for* the previous injury." *Jussila*, 59 Wn.2d at 778 (emphasis added).

The worker had received an award for permanent partial disability for the first injury. *Id.* There was no question in *Jussila* that, at the time of the second injury, the worker had "previous bodily disability" due to the first injury. *Id.* But RCW 51.16.120's second-injury fund test is two-pronged; it also expressly requires that a previous disability have "combined" with the effects of a second injury to produce permanent total disability. *Id.*

The employer in *Jussila* had failed to convince the superior court that the claimant's permanent total disability was, as a *factual* matter, due to the *combined effects* of the prior injury and the more recent one. *Id.* at 776. Rather, the superior court had found, as fact, that the worker was rendered totally and permanently disabled by the second injury alone. *Id.*

On appeal to this Court, the employer asked this Court to create a combined-effects legal presumption in favor of employers any time that a worker with a "previous bodily injury" due to an industrial injury later becomes totally and permanently disabled after suffering a second injury. *Id.* at 777-80. *Jussila* rejects this argument, noting that there is nothing in the case law or the Industrial Insurance Act to allow the employer to circumvent the express "combined effects" test of RCW 51.16.120. *Id.* *Jussila* also notes that the employer's argument for a relaxed standard conflicts with the industrial insurance principle that each employer should bear the costs arising out of industrial injuries to its own employees. *Id.* at 779 (citation omitted).

Nothing in the Opinion here is contrary to *Jussila's* holding that an employer who seeks second-injury fund relief must present some medical

evidence establishing that the claimant became totally and permanently disabled due the combined effects of previous disability and a second injury. The Opinion correctly concludes that an employer seeking relief from the second-injury fund bears the burden of establishing its right to such relief by establishing "previous bodily disability," just as *Jussila* holds that an employer must also meet the combined effects prong of the statute's two-pronged test.

Crown fails to articulate any basis for concluding that the Opinion below conflicts with *Jussila*. Crown's conclusory claim of conflict is unsupportable, and review should be denied.

VI. CONCLUSION

Crown Cork has failed to articulate grounds pursuant to RAP 13.4 upon which discretionary review can be granted, and thus its motion should be denied.

RESPECTFULLY SUBMITTED this 7th day of January, 2010.

ROBERT M. MCKENNA
Attorney General

NATALEE FILLINGER
WSBA No. 31436
Assistant Attorney General

SUPREME COURT NO. 83854-2

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

CROWN, CORK & SEAL Respondent, v. SYLVIA SMITH & DEPARTMENT OF LABOR & INDUSTRIES, Appellant.	DECLARATION OF MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Answer By Department of Labor & Indutries to Crown Cork & Seal's Petition For Review counsel by U.S. Mail Postage Prepaid via Consolidated Mail Services addressed as follows:

Lee Schultz, Attorney at Law
600 University Street #3018
Seattle, WA 98101-3304

Kathryn C. Comfort
Small, Snell, Weiss & Comfort, P.S.
PO Box 11303
Tacoma, WA 98411

DATED this 7th day of January 2010.

CYNTHIA RAVES
Legal Assistant